Supreme Court, U.S.
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NO. 88-2016

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

OLYMPIA ROOFING COMPANY, AND OLYMPIA COMPANY, INC., ET AL
Petitioners

v.

THE CELOTEX CORPORATION, STANDARD-TAYLOR INDUSTRIES, INC., STANDARD ROOFING COMPANY OF NEW ORLEANS, INC., ROBBINS TAYLOR, AND PIERRE F. CARRIERE, ET AL
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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LIST OF PARTIES AND AFFILIATED CORPORATIONS

Petitioners/Plaintiffs/Appellants:

Olympia Company, Inc.; Olympia Roofing Company

Non-Party/Petitioners' Counsel:

W. J. Manion

Respondents/Defendants/Appellees:

Standard-Taylor Industries, Inc.; Standard Roofing Company of New Orleans, Inc.; Robbins Taylor; Pierre F. Carriere; The Celotex Corporation and its parent company, Jim Walter Corporation; Affiliates of The Celotex Corporation (other than wholly owned subsidiaries) are Jim Walter International Sales Corporation, Jim Walter Research Corp., JWC Holdings Corporation, Apache Building Products Company, and Jasper Corp.

Others:

Johns-Manville Sales Corporation; Clerk, U.S. Civil District Court, Eastern District of Louisiana; Clerk, U.S. Court of Appeals for the Fifth Circuit; Hon. Charles Schwartz, Jr.; Jack N. Price

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PETITIONER'S RESPONSE TO RESPONDENTS' COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

What criteria are to be employed in determining whether sanctions are impermissibly imposed to deter criticism of judicial misconduct?

Louisiana supports concept of fair play and equal justice under the law. Court should not only be fair and

impartial, but should also appear to be fair and impartial. U.S. v. Garrison, 340 F.Supp. 952 (DC-EDLA, NO Div. 1972). This lawsuit was not filed to criticize nor emphasize judicial misconduct, but rather to request a fair trial, and therefore, no criteria is in place to defeat imposition of sanctions when justly deserved. Petitioners urge that sanctions were misapplied. Parties were not noticed, nor was consent granted to judiciary to invade exhibit boxes placed in registry of Court. Exhibit boxes were not surrendered by the judiciary until October, 1988. There is no judicial "face saving" criteria in place to allow judges to deter fair and equal treatment with imposition of sanctions and penalties. A remand is necessary to try the case as it was postured in December, 1979, upon completion of discovery.

II.

Are the penalties and sanctions imposed on Petitioners in this case unconscionable in light of the lower courts' determinations that Petitioners' claims were frivolous?

Yes! Penalties and sanctions imposed on petitioners were unconscionable if the parties and the judiciary are examining and urging secretive, different and conflicting levels of proof. Since the contents of the exhibits boxes were not in evidence, yet those contents were examined by the judiciary and not the parties to the litigation, it is hard to conceive that a fair trial was realized under any rules of evidence or civil procedure. Case law research and examination by petitioners produced no authorities that would sustain any fair trial concept as realized in this litigation. Contested conduct does not fall within any

acceptable purview of judicial discretion. It is fair to say that penalties and sanctions levied against petitioners pursuant to F.R.C.P., Rule 11, were intimidating and were intended to discourage further investigation by petitioners as to the propriety of trial procedures and subsequent judgments rendered in this litigation.

III.

Are there any circumstances in which examination by the judiciary of trial exhibits filed under seal could prejudice a party's constitutional right to a fair trial, and, if so, are those circumstances present here?

Yes! Petitioner's constitutional right to a fair trial can only be realized by equitable conduct of the judiciary. As cited in Nelson v. United States, 208 F.2d 505, 513 (CA-DC 1953), writs denied, attorney at bar cannot dictate nor correct biased judicial conduct - attorneys can only object

provided they had notice of judicial misconduct which misconduct was not known by Petitioners until October, 1988, when the exhibit boxes were returned to the petitioner. On the other hand, civil contempt of attorneys (which is not present here) may be predicated on a judicial finding of "clear and convincing" evidence that there was a lawful order given with subsequent violation thereof. Attorney's willfulness is not an element of civil contempt. 18 USCA, paragraph 401(1). Civil contempt assessment is remedial in nature in that it is brought to compel obedience to a court order. Once compliance has been achieved, civil sanctions are no longer necessary or appropriate. United States v. Greyhound Corporation, (DC-Ill. 1973) 363 F.Supp. 525, 570. Sanctions are not proper if

judiciary is at fault. Now F.R.C.P., Rule 11, has come on the scene with imposition of sanctions that intimidate and are growing more aggressive against attorneys before the bar. In this litigation, courts were informed that record was incomplete. Imposition of Rule 11 sanction further discouraged any Petitioners' pursuit of that issue. A judge can examine documents and exhibits entered into evidence in camera upon notice and presence of parties. To act otherwise, judge may well be rendering a private advisory opinion to one party to the litigation by the very nature of his rulings from the bench or, worse yet, may be swayed by what he sees or reads in and from exhibit boxes without petitioner's input or correlative linkup of the documents to the issues to be determined at trial. The exhibit boxes were a

prohibited mine field, off limits to inspection, and therefore, the petitioners have been denied a fair trial.

IV.

Does the failure of a Clerk of Court to timely return exhibits in accordance with Local Rules of Court violate the constitutional guarantee against unreasonable searches and seizures?

Yes! Failure of District and Appellate Judiciary to return petitioner's exhibits placed in registry of District Court, but not entered as evidence, necessary to resist summary judgment with subsequent appeals being adjudged frivolous, violates constitutional guarantees against unreasonable searches and seizures when judiciary examined the exhibits without notice to parties nor in response to any motion, hearings, orders, or minute entry as is customary in notice pleadings in

Federal Court. None of the parties to this litigation granted permission to judiciary to examine exhibits and contents of exhibit boxes placed in registry of Court. Respondents' counsels are in error in asserting exhibits were properly designated as "trial exhibits". Discovery was realized by Court Order and documents surrendered by all parties, subject to Protective Orders, were both personal and business records, all being placed in the registry of the Court and not introduced into evidence. Exhibits comprising in excess of 2,000 pages were placed in five (5) sealed exhibit boxes. Although petitioners continually demanded a complete record of the proceedings, respondents (Celotex and Standard Roofing, et al) never requested the Court to return their documents submitted pursuant to discovery orders. Trustee of

Johns-Manville Sales Corporation, debtor in bankruptcy and a non-party, never requested the Court to return their documents submitted pursuant to discovery orders. U.S. Constitutional Amendment 5 controls Federal actions directed to abuses of constitutional guarantees and due process. Further, unreasonable searches and seizures are provided in U.S.C.A. Const.Amend 4; Bell v. Hood (DC-SD Cal 1947) 71 F.Supp. 813, 816. If the Court saw fit not to return the exhibits to any parties, the Court cannot reserve and retain said exhibits for their own use without notice, conference and/or hearing on such an action. Constitutional guarantees against unreasonable searches and seizures applies with equal force to the executive, legislative, and judicial actions. USCA Const.Amend 4; Nelson v.

United States, (supra).

V.

Is a Petition for a Writ of Certiorari filed four years after the Judgment sought to be reviewed timely?

Yes! Timeliness occasions when exhibit boxes were returned to petitioner in October, 1988. It should be noted that none of the defendant respondents, as well as non-party Johns-Manville Sales Corporation (all proponents of Protective Orders) did nothing to have exhibits released by the Court and returned to their respective ownership. In all candor, respondents were distressed that these boxes were surrendered. This litigation was filed on February 5, 1979 and has been in limbo since exhibits were boxed, sealed and placed in registry of the Court in December, 1979. All that transpired from December, 1979 onward was tainted and subject to remand. There is

no definitive date as to when District Court invaded the exhibit boxes. Even if the date of invasion was known, examination of the exhibits without notice to and consent of the parties is invalid, thereby requiring a new trial. Parties made no procedural mistake - the judiciary did; and consequently, petitioners should not be required to submissively accept case dismissal subject to costs and sanctions.

RES JUDICATA
BRUNSWICK CORPORATION V.
PUEBLO BOWL-O-MAT, INC.
429 U.S. 177 (1977)

Respondents' defense is that a definitive judgment has been rendered and that nothing can be urged that would change the outcome. Additionally, many years have passed, and there comes a moment with litigation must cease.

Petitioners urge that judiciary need only

to take a consistent position and re-evaluate their judgment in a fair and equitable fashion. Petitioners urge that exhibits subject to Protective Orders were not available to parties at hearing on Summary Judgment and any appellate procedure. Stated another way, a full record submitted to judiciary was not available to parties. It is proper to cite that two appellate judges of United States Fifth Circuit, that have reviewed petitioners' litigation, namely, Judges Reavley and Williams, have taken a stand in a criminal case before them that is consistent with that being urged by petitioners. In U.S. v. Weintraub, 871 F.2d 1257 (CA 5 Cir. 1989), aforesaid judges concluded that the defendant, Weintraub, would not have been acquitted even if excluded impeachment material been give to him before trial. He was

guilty as charged. However, Weintraub could not be sentenced because the withheld impeachment evidence was not in the record, and this evidence was necessary and material for the judges to determine the length of Weintraub's punishment. That judgment is exactly on point with this appeal. If petitioners were not in possession of, or with access to, exhibits placed in registry of Court, then the judiciary could not rule against petitioners in anti-trust litigation. Petitioners request and claim nothing more than a complete and full record, with exhibits, is in order to prevail at trial, and that remand is indicated. Stated another way, we start over.

REASON WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

I.

Petitioner's objections to the

manner and mode of procedure pursued in this case at both District and Appellate level is nothing more than protest to have the opportunity for a fair hearing and due process. Due process of law, in the due course of legal proceedings and according to the rules and forms which have been established for the protection of private rights, refers to laws which hear before it condemns, and which proceeds upon inquiry and renders judgment only after trial. King v. Brown, 115 So.2d 405, 410 (La.App. 2 Cir. 1959); Tang Tun v. Edsell, 223 U.S. 673, 681, 32 S.Ct. 359, 363, 56 L.Ed. 606; Bilokumsky v. Tod, 263 U.S. at 157, 44 S.Ct. 54, 68 L.Ed. 221. The issue of in camera inspection by judges of petitioners' exhibits not in evidence, without notice, and without any motion for hearing by parties, is not addressed

in the case law of Louisiana, and the absence thereof is urged by petitioners as unreasonable searches in violation of constitutional guarantees. In camera inspection is not a art form, but a discovery device to establish facts and truths. Louisiana Courts have followed Federal Courts discovery rules, and consistent therewith, have determined that in camera inspection by trial court is approved to determine whether party attorney's file contained discoverable material. Hodges v. Southern Farm Bureau Casualty Ins. Co., 433 So.2d 125 (La. 1983); LSA-C.C.P. art. 1422, et seq.; Venable v. Smith, 529 So.2d 888 (La.App. 3 Cir. 1988). Issues presented in the aforementioned insurance and compensation cases respectively address the right of the insured or injured plaintiff to discover, in camera, portions of the

defendant's file prepared by defendants either after the accident or in preparation of anticipated litigation. Denial of this procedural tool of discovery might unfairly prejudice plaintiff's preparation of claim, thereby causing undue hardship or injustice. Discovery is a procedural concept extended to parties - not judges or magistrates. The aforesaid citations are not the scenario before this Court. Discovery was completed (shut off); petitioners' exhibits were sealed and placed in registry of the Court; no motions were filed by parties to examine the contents of exhibit boxes; neither orders nor notices were entered into the procedural record by District or Appellate judiciary that seals of the exhibit boxes (material, but not in evidence) were to be broken and examined

privately by the judiciary. Additionally, impounded exhibit boxes were not released to any parties for trial or appellate preparation and briefing. Liberality of discovery is extended by this Court to parties and experts and cannot be expanded to free examinations of exhibits, not in evidence, by judges without notice and consent. Versed another way, invasion of privacy and unreasonable, as well as unauthorized, searches occurred to the petitioners' detriment.

II.

Bearing in mind this litigation was tainted with ill practices from December 15, 1979 forward and request for a new trial is based on allegations of petitioners' original and amended complaint prior to that date, therefore the holdings of Brunswick Corp. v. Pueblo

Bowl-O-Mat, Inc., 429 U.S. 477 (1977) are not controlling. Petitioners were denied pricing by Celotex to bid Chem-Ply re-roofing of Southern University Mini-Dome in Baton Rouge, Louisiana. Loss of anticipated profit was not speculative as petitioners had profitably performed services on this job once Standard Roofing was placed in default. Coupled with restraint of trade, Celotex breached its contract with petitioners. Conspiracy of defendants to discredit petitioners was documented. There were cognizable damages realized. The length of this litigation is not the fault of petitioners. Once invasion of exhibit boxes was ascertained, prescription began to run from October, 1988 when Court surrendered the five exhibit boxes. Defendant-respondents urged that summary judgment was proper, being based on

submitted pre-trial statement. Petitioners contend that summary judgment cannot be sustained if the Court examined exhibits after December 15, 1979 not in evidence and without notice or hearing. A full and complete record was never established.

CONCLUSION

Violation of U.S. Constitution Amendments 4 and 5 have occasioned. Petition for Writ of Certiorari should be granted with subsequent remand and new trial from posture of case in December, 1979, with completion of discovery and submittal of new pre-trial statement necessary to govern conduct of trial.

Respectfully submitted,

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